NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

ANTHONY JEROME BILLINGS, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a conviction for sale of cocaine in violation of Fla. Stat. § 893.13 a "controlled substance offense" as defined in U.S.S.G. § 4B1.2(b) if, according to the Florida legislature, the state need not prove the defendant "knew the illicit nature of the substance" he sold?

II. Is a conviction for aggravated assault with a firearm in violation of Fla. Stat. § 784.021 a "crime of violence" as defined under the elements clause in U.S.S.G. § 4B1.2(a)(1), if that offense requires proof of mere reckless *mens rea*, rather than an intentional act?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

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Petitioner Anthony Billings respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in Case No. 19-13753 in that court on October 2, 2020, *United States v. Billings,* 829 F. App'x 461 (11th Cir. Oct. 2, 2020), which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

The Eleventh Circuit's decision below is unreported, but reproduced as Appendix A. The district court's final judgment is reproduced as Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The court of appeals entered its decision on October 2, 2020. Mr. Billings timely files this petition pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because the Government charged the petitioner with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeal shall have jurisdiction over all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory and other provisions:

U.S.S.G. § 4B1.1 ("Career Offender")

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. ...

U.S.S.G. § 4B1.2 ("Definitions of Terms Used in Section § 4B1.1")

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

18 U.S.C. § 924(e) ("Penalties" – "Armed Career Criminal Act")

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

(2) As used in this subsection –

(A) the term "serious drug offense" means – . . .

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year. . . . that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. § 893.13 ("Prohibited acts; penalties")

(1)(a) Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.

Fla. Stat. § 893.101 ("Legislative findings and intent," effective May 13, 2002)

(1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant know of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissible presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

STATEMENT OF THE CASE

On May 16, 2019, a federal grand jury sitting in the Southern District of Florida returned a four-count indictment against Anthony Jerome Billings, Jr., charging him with one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii); one count of with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1); and two counts of distribution of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). He pled guilty to possession with intent to distribute cocaine and possession of a firearm by a convicted felon pursuant to a written plea agreement. The presentence investigation report (PSI) classified Mr. Billings as a career offender based on his prior Florida convictions for sale of cocaine and aggravated assault with a firearm. His advisory guidelines range was 188-235 months' imprisonment.

Prior to sentencing, and again at sentencing, Mr. Billings objected to the career offender classification because his Florida drug conviction did not require the state to prove *mens rea*. He acknowledged that the Eleventh Circuit had previously ruled to the contrary in *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), but raised the issue to preserve it for further appellate review. The district court overruled the objection, acknowledging that Mr. Billings had preserved the issue.

Mr. Billings requested a sentence of 92 months, explaining that without the career offender enhancement, his guideline range would have been 92 to 115 months. The government asked the court to impose a sentence of 188 months. The district court sentenced Mr. Billings to 144 months' imprisonment. Mr. Billings objected to

the sentence as substantively unreasonable, and renewed his objection to the use of the sale of cocaine conviction as a predicate offense for the career offender classification.

On appeal to the Eleventh Circuit, Mr. Billings, acknowledging that the Court had rejected his argument in *Smith,* maintained that his classification as a career offender was erroneous because his Florida drug conviction did not qualify as a "controlled substance offense" since it lacked *mens rea.* He also argued that his aggravated assault conviction did not qualify as a "crime of violence" because the conviction did not require proof of an intentional act, but rather, only one with a reckless *mens rea*. He acknowledged that Eleventh Circuit precedent in *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017) and *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013) foreclosed this argument, but argued that the Eleventh Circuit had wrongly decided those cases.

The Eleventh Circuit affirmed Mr. Billings' sentence on October 2, 2020. *United States v. Billings*, 829 F. App'x 461 (11th Cir. Oct. 2, 2020). As to the drug prior, the Court found that the definition of "controlled substance offense" under U.S.S.G. § 4B1.2(b) does not require "that a predicate state offense include[] an element of *mens rea* with respect to the illicit nature of the controlled substance," and that the argument was "foreclosed by [the] decision in *Smith*." *Id.* at 463. As to the "crime of violence" predicate, the Court declined to reach the merits, finding that Mr. Billings invited the error in the district court. *Id*. at 465. The Court also noted that its precedent in *Turner* would have foreclosed his argument. *Id*. at 465, n.1.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's precedential and far-reaching decision that a "controlled substance offense" under U.S.S.G. § 4B1.2(b) does not require proof of either an express or implied *mens rea* element is inconsistent with, and misapplies this Court's precedents, disregards well-settled rules of construction, and conflicts with other circuits' interpretations of the identical or similar definitions.

Forty-nine states, either by statute or judicial decision, require that the prosecution prove, as an element of a criminal drug trafficking offense, the defendant knew of the illicit nature of the substance he distributed or possessed with intent to distribute. Only Florida does not.[1] Despite this general consensus, the Eleventh Circuit held in a precedential and far-reaching decision, *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), that for purposes of the Career Offender enhancement in the Guidelines, *mens rea* is neither an express nor implied element in the definition of "controlled substance offense."

In so holding, the Eleventh Circuit treated the "controlled substance offense" definition in the Guidelines identically to the "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) (the Armed Career Criminal Act (ACCA)), stating:

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[1] Although Washington eliminates *mens rea* for simple drug possession offenses, *see State v. Bradshaw*, 98 P.3d 1190 (Wash. 2004) (*en banc*), only Florida has since 2002 eliminated *mens rea* for possession with intent to distribute and distribution offenses. *State v. Adkins*, 96 So.3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring) (noting that Florida's drug law is "clearly out of the mainstream;" citing survey in *Dawkins v. State*, 547 A.2d 1041, 1045, 1046 n.10 (1988)). Every other state but Florida requires that knowledge of the illicit nature of the controlled substance be an element of a drug distribution or possession with intent to distribute offense.

> No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements, *United States v. Duran*, 596 F.3d 1283, 1291 (11th Cir. 2010), and we presume that Congress and the Sentencing Commission "said what [they] meant and meant what [they] said," *United States v. Strickland*, 261 F.3d 1271, 1274 (11th Cir. 2001) (internal quotation marks and citation omitted); *see also United States v. Shannon*, 631 F.3d 1187, 1190 (11th Cir. 2011). The definitions require only that the predicate offense "involv[es]," 18 U.S.C. § 924(e)(2)(A)(ii), and "prohibit[s]," U.S.S.G. § 4B1.2(b), certain activities related to controlled substances.
>
> Smith and Nunez argue that the presumption in favor of mental culpability and the rule of lenity, *Staples v. United States*, 511 U.S. 600, 606, 619, 114 S. Ct. 1793, 1797, 1804, 128 L.Ed.2d 608 (1994), require us to imply an element of *mens rea* in the federal definitions, but we disagree. The presumption in favor of mental culpability and the rule of lenity apply to sentencing enhancements only when the text of the statute or guideline is ambiguous. *United States v. Dean*, 517 F.3d 1224, 1229 (11th Cir. 2008); *United States v. Richardson*, 8 F.3d 769, 770 (11th Cir. 1993). The definitions of "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii), and "controlled substance offense," U.S.S.G. § 4B1.2(b), are unambiguous.

Smith, 775 F.3d at 1267.

The defendants in *Smith* jointly petitioned the Eleventh Circuit to rehear their case *en banc*, but the Eleventh Circuit denied rehearing. As a result, a conviction under the post-2002 version of Fla. Stat. § 893.13 – the only strict liability possession with intent to distribute statute in the nation at this time – may now properly be counted as both an ACCA and a Career Offender predicate. The Eleventh Circuit has so held in numerous other cases since *Smith*. Indeed, the Eleventh Circuit once again followed *Smith* in Mr. Billings' case, despite this Court's contrary precedents.

In defining the term "controlled substance offense" originally, the Sentencing Commission closely tracked the language of 28 U.S.C. § 994(h), and defined this new Career Offender predicate as "an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959, *and similar offenses.*" § 4B1.2(2) (1988) (emphasis added). Soon, however, the "similarity" requirement in that definition proved cumbersome and confusing. Therefore, in 1989, the Commission "clarified" its original definition of "controlled substance offense," by redefining it more simply – in generic terms, identical to those in § 924(e)(2)(A)(ii) – to state that a "controlled substance offense" for purposes of the Career Offender enhancement and the § 2K2.1 enhancements, means:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

§ 4B1.2(b). *See* U.S.S.G., App. C., Amend. 268 ("The purpose of this amendment is to clarify the definitions of crime of violence and controlled substance offense used in this guideline"). The generic trafficking offenses the Commission referenced in § 4B1.2(b) are the same generic trafficking offenses Congress referenced in § 924(e)(2)(A)(ii). The only difference in the wording of these provisions is the use of the term "prohibits" in the Guidelines instead of the word "involving" used in the ACCA definition.

The Eleventh Circuit applies traditional rules of statutory construction in interpreting the Guidelines. *See United States v. Shannon*, 631 F.3d 1187 (11th Cir.

2011). Where, as here, the question of guideline construction involved implied *mens rea*, the pertinent rule of construction is that set forth in *Staples v. United States*, 511 U.S. 600 (1994). Applying the reasoning of *Staples*, the Eleventh Circuit should have presumed *mens rea* is an element of any "controlled substance offense" as defined in § 4B1.2(b), unless it found some express or *implied* indication from the Commission that it intended to "dispense with" *mens rea* as an element of any "controlled substance offense" in § 4B1.2(b). There is no such indication here.

The Commission's original definition of the term "controlled substance offense" in § 4B1.2 necessitated proof that any state offense counted as a Career Offender predicate – like the listed Federal offenses – actually involved "trafficking." Trafficking, plainly, necessitates *mens rea*. *See Young v. United States*, 936 F.2d 533, 538 (11th Cir. 1991). Although the Commission amended that definition in 1989, and redefined a "controlled substance offense" by more simply enumerating generic trafficking offenses, it notably described that amendment as a mere "clarification" of its original definition, not a "substantive change." *See* U.S.S.G. App. C., Amend. 268 ("Reason for Amendment").

If the Eleventh Circuit questioned the Commission's actual intent in adding the current definition of "controlled substance offense" in 1989, it should have considered the "background commentary" the Commission added to § 4B1.1 in 1995, which provides further clarity on that issue. There, the Commission explained it intended its prior definitional modifications to § 4B1.2 to be "*consistent*" with the Congressional directives in 28 U.S.C. § 994(h) to "focus" the harsh Career Offender

penalties "more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate," to avoid "unwarranted sentencing disparities among defendants with *similar records* who have been found guilty of *similar criminal conduct*," and thus, to more consistently and rationally assure that the substantial prison terms authorized in § 4B1.1 are imposed upon "repeat drug *traffickers*." *See* § 4B1.1, comment. (backg'd.); App. C., amend. 528 (emphasis added).

Since there is no indication – either expressly or impliedly – that the Commission intended to "dispense with *mens rea*" for any "controlled substance offense" as defined in current § 4B1.2(b), and given the severity of the penalties associated with the Career Offender classification, the Eleventh Circuit should have held that *mens rea* remained an "implied element" of any "controlled substance offense" within the definition in § 4B1.2(b). Notably, even if there were another "equally rational" reading of § 4B1.2(b), the rule of lenity required the Eleventh Circuit to adopt the defense-favorable construction of § 4B1.2(b) "[u]ntil the sentencing guidelines and accompanying commentaries are made to be more precise." *United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004).

A. The Eleventh Circuit's holding in *Smith* that the language used in the definition of § 4B1.2(b) is "unambiguous," and does not contain a *mens rea* requirement, conflicts with decisions of the Second and Fifth Circuits interpreting identical or similar language to necessitate proof of *mens rea*.

The Second and Fifth Circuits have read language identical or similar to that in both § 924(e)(2)(A)(ii) and § 4B1.2(b) – specifically, the reference to offenses under

state law that involve or prohibit controlled substance distribution – to impliedly include a *mens rea* requirement.

In *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008), the Second Circuit held that a mere "offer to sell" is not a "controlled substance offense" under § 4B1.2(b) because "a crime not involving the *mental culpability to commit a substantive narcotics offense* [does not] serve as a predicate 'controlled substance offense' under the Guidelines." *Id.* at 965-966 (emphasis added). And, the Fifth Circuit has held that the definition of "drug trafficking offense" in U.S.S.G. § 2L1.2 – which is nearly identical to § 4B1.2(b) – requires proof that the defendant knew the controlled substance was for distribution. *See United States v. Fuentes-Oyervides*, 541 F.3d 286, 289 (5th Cir. 2008) (finding that a violation of the Ohio statute was a "drug trafficking offense" because it "requires *a level of understanding that the drugs* are for sale or resale," and "explicitly includes a *mens rea* requirement concerning distribution;" holding that so long as a state statute requires the defendant "to distribute a controlled substance while he knows or should know that the substance is intended for sale," "he commits an act of distribution under the Guidelines.") *Id.* at 289. Moreover, in *United States v. Medina*, 589 F. App'x 277 (5th Cir. 2015), the Fifth Circuit read the definition of "drug trafficking offense" in § 2L1.2 to include an implied *mens rea* element. Accordingly, the *Medina* court found a conviction under Fla. Stat. § 893.13 was not a predicate offense "[b]ecause the Florida law does not require that a defendant know the illicit nature of the substance involved in the offense." *Id.* at 277.

Mr. Billings' misfortune of facing sentencing in the Eleventh Circuit, rather than in the Second or Fifth, could not be more obvious. A similarly situated defendant in those circuits would not have been subject to the harsh Career Offender enhanced sentence he and other defendants in the Eleventh Circuit face because of *Smith*. Since the interpretation and application of these enhancements should not vary by location, this Court should resolve the circuit conflict on this issue by granting certiorari.

B. This Court's decisions in *McFadden v. United States* and *Elonis v. United States* confirm the clear error in the Eleventh Circuit's holding that the language of § 4B1.2(b) is unambiguous, and does not contain a *mens rea* requirement.

In *McFadden v. United States*, 576 U.S. 186 (2015), this Court granted certiorari to resolve a circuit conflict as to how the *mens rea* requirement under the Controlled Substance Analogue ("CSA") Act of 1986, codified under 21 U.S.C. § 813, for knowingly manufacturing, distributing, or possessing with intent to distribute "a controlled substance" applies, when the controlled substance is an analogue. The Fourth Circuit Court of Appeals did not adhere to § 813's directive to treat a controlled substance analogue "as a controlled substance in Schedule I," and, accordingly, it did not apply the *mens rea* requirement of 21 U.S.C. § 841(a)(1). *Id.* at 195. The Fourth Circuit wrongly concluded that the only mental state prosecutors must prove under § 813 was that the analogue be "intended for human consumption." *Id.*

This Court disagreed, and held that since § 841(a)(1) expressly requires the government prove a defendant *knew* he was dealing with a "controlled substance," "it follows that the government must prove a defendant *knew* that the substance with which he was dealing was a controlled substance" in a § 813 prosecution for an

analogue. *Id.* at 194 (emphasis added). This Court's holding in *McFadden* – that proof of *mens rea* is required to convict a defendant under the CSA Act, even without an express *mens rea* term – underscores and confirms the Eleventh Circuit's error in this case.

In *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001 (2015), this Court reaffirmed that *mens rea* is required in criminal statutes. In *Elonis*, the Court held that the federal crime of making threatening communications, pursuant to 18 U.S.C. § 875(c), required proof that the defendant, in making postings on a social networking website, intended to issue threats or *knew* the communications would be viewed as threats. 575 U.S. at ___, 135 S. Ct. at 2012. Relying on *Staples*, this Court held the lower court's "reasonable person" standard was inconsistent with the "conventional requirement for criminal conduct – *awareness* of some wrongdoing." *Id.*

Absent a significant reason to believe Congress intended otherwise, *Staples* requires courts to imply a requirement the defendant must *know* the facts that make his conduct illegal. *McFadden* and *Elonis* underscore and confirm the error in the Eleventh Circuit's contrary reading of § 4B1.2(b) in *Smith*.

C. *Shular* did not decide the *mens rea* issue.

In *Shular v. United States,* ___ U.S. ___, 140 S. Ct. 779 (2020), this Court resolved a narrow circuit conflict as to the proper methodology for determining whether a state offense qualifies as a "serious drug offense," as defined in 18 U.S.C. § 924(e)(2)(A)(ii). In that provision, Congress defined a "serious drug offense" as a state offense that "involv[es] manufacturing, distributing, or possessing with intent

to manufacture or distribute a controlled substance." While Shular argued that such language required a "generic offense matching exercise," the government countered that the word "involves" broadened the analysis to only require the state offense's elements "necessarily entail one of the types of conduct" identified in § 924(e)(2)(A)(ii). *Id.* at 784. Ultimately, this Court agreed with the government, and held that the definition in § 924(e)(2)(A)(ii) refers only to *conduct*, not generic offenses. *Id.* at 785.

In rejecting Shular's generic offense argument, this Court approved the Eleventh Circuit's holding in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), that a court need not search for the elements of the generic definition of "serious drug offense." *See Shular*, ___ U.S. ___, 140 S. Ct. at 784. However, this Court did not address the Eleventh Circuit's alternative holding in Smith – that a violation of Fla. Stat. § 893.13 was a "serious drug offense," even without proof the defendant knew the illicit nature of the substance he distributed or possessed. The Court declined to address this alternative holding because it "f[e]ll outside the question presented" and because "Shular disclaimed it at the certiorari stage." 140 S. Ct. at 787, n. 3. The Court should now address *Smith*'s alternative holding, and reject any suggestion of implied *mens rea* in § 924(e)(2)(A)(ii) or § 4B1.2(b).

In *Smith,* the Eleventh Circuit disregarded this Court's long and consistent line of precedents applying a presumption of *mens rea* when Congress is silent, and mandating that the listed "activities" in § 924(e)(2)(A)(ii) all be read to require knowledge of the illicit nature of the substance, even without the express mention of *mens rea* by Congress. *See Morissette v. United States*, 342 U.S. 246, 250 (1952);

Staples v. United States, 511 U.S. 600, 608 (1994); *Elonis v. United States*, 575 U.S. 723, ___, 135 S. Ct. 2001, 2012 (2015); and *McFadden v. United States*, 576 U.S. 186, 189 (2015).

The "implied *mens rea*" question is an important and recurring one in the Eleventh Circuit. It affects scores of criminal defendants who have received, and will continue to receive, enhanced ACCA or Career Offender sentences based upon *Smith*. It also impacts those newly charged with drug offenses under 21 U.S.C. §§ 841 and 851, particularly because in Section 401 of the First Step Act of 2018, Congress made the "serious drug offense" definition in § 924(e)(2)(A) the touchstone for recidivist enhancements. Eleventh Circuit defendants will continue to be treated unfairly and disparately from their cohorts in other circuits, unless and until this Court grants certiorari to specifically address the alternative holding of *Smith* that rejected any implication of *mens rea* in § 924(e)(2)(A)(ii) or § 4B1.2(b).

II. This Court will decide in *Borden* whether offenses with a reckless *mens rea* satisfy the ACCA's elements clause, which has language identical to the elements clause in the Career Offender guideline.

This Court granted certiorari in *Borden v. United States,* 140 S. Ct. 1262 (cert. granted Mar. 2, 2020), on the following issue: "Does the 'use of force' clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), encompass crimes with a *mens rea* of mere recklessness?" The "use of force" clause under the ACCA is identical to the "use of force" clause under the Career Offender guideline, at issue in the instant case. *See* U.S.S.G. § 4B1.2(a)(1). *Borden,* from the Sixth Circuit, addresses Tennessee aggravated assault, which like Florida aggravated assault used

to qualify Mr. Billings as a career offender, can be committed with a *mens rea* of mere recklessness. *See DuPree v. State*, 310 So.2d 396 (2d DCA 1975) ("to sustain appellant's conviction for aggravated assault in this case, his conduct must be equivalent to culpable negligence"); *Green v. State*, 315 So.2d 499 (4th DCA 1975) ("Where, as here, there is no proof of an intentional assault, proof of intent may be supplied by proof of conduct equivalent to culpable negligence").

There is currently a Circuit split as to whether reckless conduct satisfies the ACCA's elements clause definition of "violent felony." A favorable decision in *Borden* would vindicate Petitioner's argument that the district court erroneously classified him as a career offender based on a Florida aggravated assault conviction, and would reduce his sentencing guidelines range. Petitioner respectfully requests that the Court hold this petition for that forthcoming decision.

CONCLUSION

This Court should grant Mr. Billings' petition for a writ of certiorari regarding whether his Florida drug conviction is a controlled substance offense under the career offender guideline. In the alternative, this Court should hold this petition until it decides *Borden*. If this Court decides *Borden* in the Petitioner's favor, it should grant certiorari, vacate the judgment below, and remand for further proceedings.

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